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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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27 Audrey Davis,
28 Plaintiff /
29 Counterclaim-Defendant,
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31 v.
32 Rhondie Voorhees,
33 Defendant /
34 Counterclaim-Plaintiff,
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36 and,
37 ERAU,
38 Defendant.

39 Case No. 3:21-cv-08249-DLR

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PLAINTIFF'S MOTION FOR
RECONSIDERATION/CLARIFICATION
OF ORDER [DOC. 97] GRANTING
DEFENDANT VOORHEES'S MOTION
FOR JUDGMENT ON THE PLEADINGS
AS TO COUNT III [DOC. 75]

1 Plaintiff / Counterclaim-Defendant Audrey Davis hereby files under LRCiv. 7.2(g)
2 her motion seeking reconsideration or, alternatively, clarification regarding the Court's
3 Order of June 8, 2023 (Doc. 97) granting Defendant / Counterclaim-Plaintiff Rhondie
4 Voorhees's Motion for Judgment on the Pleadings as to Count III of Davis's Amended
5 Complaint (Doc. 75).

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **1.0 INTRODUCTION AND FACTUAL BACKGROUND**

8 On February 7, 2023, Voorhees filed her Motion for Judgment on the Pleadings as
9 to Count II of Davis's Amended Complaint (Doc. 75). Davis filed her opposition to the
10 motion on February 21, 2023 (Doc. 77), and Voorhees filed her reply on February 28, 2023
11 (Doc. 78). After the Court issued an order on May 25, 2023 requesting supplemental
12 briefing on the motion (Doc. 87), the parties filed their supplemental briefs on May 31
13 (Docs. 88 & 89), and responses on June 2 (Docs. 90 & 91). The Court granted Voorhees's
14 motion on June 8, 2023 (Doc. 97), reasoning that a person cannot be liable for violation of
15 the SCRA if they did not file a motion for default *judgment*.

16 The Court did not, however, address Davis's request for certification of this issue
17 for immediate interlocutory appeal to the Ninth Circuit pursuant to 28 U.S.C. § 1292(b).
18 As explained in Davis's opposition and below, the Court's Order granting Voorhees's
19 motion involves a controlling question of law as to which there is substantial ground for
20 difference of opinion, and an immediate appeal from the Order may materially advance the
21 ultimate termination of the litigation. By failing to address this request for relief, the Court
22 committed clear error and manifest injustice.

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1 **2.0 LEGAL STANDARD**

2 A party may bring a motion for reconsideration of a court's order under LRCiv
3 7.2(g), though such motions are disfavored absent "a showing of manifest error or a
4 showing of new facts or legal authority that could not have been brought to its attention
5 earlier with reasonable diligence." Reconsideration of an order is appropriate where there
6 is new evidence, the court committed a clear error or manifest injustice, or if there is an
7 intervening change in controlling law. *Vanaman v. McLaughlin*, No. 17-00446-TUC-JGZ,
8 2020 U.S. Dist. LEXIS 87587, *4 (D. Ariz. May 15, 2020) (reconsidering and vacating
9 order denying motion to dismiss).

10 **3.0 LEGAL ARGUMENT**

11 **3.1 The Court Committed Clear Legal Error in Not Addressing Davis's
12 Request for Certification to the Ninth Circuit**

13 In her Opposition, Davis requested that the Court make findings required for
14 immediate interlocutory appeal to the 9th Circuit pursuant to 28 U.S.C. § 1292(b). The
15 Ninth Circuit has determined that "[c]ertification under § 1292(b) requires the district court
16 to expressly find in writing that all three § 1292(b) requirements are met." *Couch v.*
17 *Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). That statute provides:

18 When a district judge, in making in a civil action an order not otherwise
19 appealable under this section, shall be of the opinion that such order involves
20 a controlling question of law as to which there is substantial ground for
21 difference of opinion and that an immediate appeal from the order may
22 materially advance the ultimate termination of the litigation, he shall so state
23 in writing in such order. The Court of Appeals which would have jurisdiction
24 of an appeal of such action may thereupon, in its discretion, permit an appeal
25 to be taken from such order, if application is made to it within ten days after
the entry of the order: Provided, however, That application for an appeal
hereunder shall not stay proceedings in the district court unless the district
judge or the Court of Appeals or a judge thereof shall so order.

1 28 U.S.C. § 1292(b). “Substantial grounds for difference of opinion” exist when controlling
2 law on an issue is unclear, typically where ““the circuits are in dispute on the question and
3 the court of appeals of the circuit has not spoken on this point, . . . or if novel and difficult
4 questions of first impression are presented.”” *Couch*, 611 F.3d at 633 (quoting 3 Federal
5 Procedure, Lawyers Edition § 3:212 (2010)).

6 **3.1.1 There are Substantial Grounds for Difference of Opinion**

7 Davis brought her SCRA claim not only to vindicate her own interests – but to serve
8 all of her fellow service members who might otherwise find themselves similarly treated.
9 This Motion does not ask the Court to reach a different conclusion as to dismissal of Davis’s
10 SCRA claim, although such a request is not waived nor would a *sua sponte* reversal be
11 unappreciated. Rather, Davis requests that the Court address the portion of the request for
12 interlocutory appeal on the basis that there are substantial grounds for difference of opinion
13 as to whether an SCRA violation may occur before entry of default *judgment*, and that an
14 immediate appeal on this issue may materially advance the ultimate termination of this
15 litigation.

16 The SCRA “was created to allow for the suspension of civil actions for those persons
17 in the military in order to allow military personnel to devote their entire energy to the
18 defense of the nation.” *Bernhardt v. Alden Cafe*, 864 A.2d 421, 425 (N.J. Super. App. Div.
19 2005) (internal quotations omitted). “The Act has long been liberally construed to protect
20 those men and women who drop their own affairs to take up the burdens of their country.”
21 *Sprinkle v. SB&C Ltd.*, 472 F. Supp. 2d 1235, 1244 (W.D. Wash. 2006) (citing *Boone v.*
22 *Lightner*, 319 U.S. 561, 574 (1943); *Conroy v. Aniskoff*, 507 U.S. 511, 516 & n.9 (1993)).
23 It protects the career officer as well as the temporary soldier. See *Omega Indus., Inc. v.*
24 *Raffaele*, 894 F. Supp. 1425, 1434 (D. Nev. 1995). The Supreme Court has instructed lower
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1 courts that “the Act must be read with an eye friendly to those who dropped their affairs to
2 answer their country's call.” *Maistre v. Leffers*, 333 U.S. 1, 6 (1948); *see also Davis v.*
3 *Jacobson*, 2014 U.S. Dist. LEXIS 157693, at *9 (D. Conn. Nov. 7, 2014). The purposes of
4 the SCRA is

5 (1) to provide for, strengthen, and expedite the national defense through
6 protection extended by this Act . . . to servicemembers of the United States
7 to enable such persons **to devote their entire energy to the defense needs**
of the Nation; and

8 (2) to provide for the **temporary suspension of judicial and administrative**
9 **proceedings and transactions** that may adversely affect the civil rights of
servicemembers during their military service.

10 50 U.S.C. § 3092 (emphasis added).

11 As argued in Davis’s Opposition, the SCRA is not narrowed to merely “default
12 *judgments*.” “The Soldiers’ and Sailors’ Civil Relief Act is always to be liberally construed
13 to protect those who have been obliged to drop their own affairs to take up the burdens of
14 the nation.” *Boone*, 319 U.S. at 576. The SCRA defines “judgment” to mean “any
15 judgment, decree, order, or ruling, final or temporary.” 50 U.S.C. § 3911.

16 Of course, it is hardly unusual for one District Court to see that another court has
17 ruled on a question, and then just choose the road already traveled. That is what seems to
18 be the case here, as the Court relied on *Palaciosreal*. While *Palaciosreal v. Indem. Co. of*
19 *California, Inc.*, No. CV1300993RGKDTBX, 2013 U.S. Dist. LEXIS 201940 (C.D. Cal.
20 Oct. 21, 2013), supports the extremely narrow definition of “judgment” Voorhees
21 promotes, the *Palaciosreal* court was lazy. It failed to even look at the definitions that the
22 statute itself provides. A court must look at the definitions in the SCRA, and the failure of
23 the *Palaciosreal* court to do so means that scope of the term “judgment” is still a novel and
24 difficult legal issue of first impression in this Circuit. The Ninth Circuit has not ruled on
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1 this legal issue, and the controlling law is not settled just because a single district court
2 engaged in a flawed analysis. This Court's opinion may ultimately be upheld by the 9th
3 Circuit. However, simply following *Palaciosreal* is not good practice.

4 As an example of how the *Palaciosreal* court's reasoning was myopic, the Judge
5 Advocates General School prepares officers to survey the entire SCRA to construe its
6 meaning.

7 **(7) Timing of Motion for Default.** In a traditional sense, one often thinks of
8 default judgments being entered shortly after a defendant fails to answer or
9 otherwise appear in a case. Things can be more complicated and a judgment
10 tantamount to a default judgment can occur at any time. In fact, the SCRA
11 defines judgment very broadly to include "any judgment, decree, order, or
12 ruling, final or temporary." Thus, focus needs be placed on the meaning of
13 any court decision.

14 *The Judge Advocate General's School's Guide to the Servicemembers Civil Relief Act*, 37
15 (March 2006).

16 Furthermore, while the *Palaciosreal* court applied a single rule of statutory
17 construction, it skipped over all the others. 2013 U.S. Dist. LEXIS 201940, at *8 (C.D.
18 Cal. Oct. 21, 2013). "It is a fundamental canon of statutory construction that the words of
19 a statute must be read in their context and with a view to their place in the overall statutory
20 scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). "The purpose of
21 statutory construction is to discern the intent of Congress in enacting a particular statute."
22 *Robinson v. U.S.*, 586 F.3d 683, 686 (9th Cir. 2009) (quoting *United States v. Daas*, 198
23 F.3d 1167, 1174 (9th Cir. 1999)). "We may also use canons of construction, legislative
24 history, and the statute's overall purpose to illuminate Congress's intent." *Pacific Coast
Fed'n. of Fishermen's Ass'ns. v. Glaser*, 937 F.3d 1191, 1198 (9th Cir. 2019) (cleaned up).

25 "We must examine the meaning of the words to see whether one construction makes
26 more sense than the other as a means of attributing a rational purpose to Congress." *United*

1 *States v. Rundo*, 990 F.3d 709, 718 (9th Cir. 2021) (quoting *Longview Fibre Co. v.*
2 *Rasmussen*, 980 F.2d 1307, 1311 (9th Cir. 1992)). “When a statute is fairly susceptible of
3 two constructions, one leading inevitably to mischief or absurdity and the other consisting
4 of sound sense and wise policy, the former should be rejected and the latter adopted.”
5 *Estrella v. Brandt*, 682 F.2d 814, 817-818 (9th Cir. 1982) (citation omitted). “[I]f a statute
6 is amenable to two alternative interpretations, the one that leads to the more reasonable
7 result will be followed.” *Astaire v. Best Film & Video Corp.*, 136 F.3d 1208, 1209 (9th Cir.
8 1998) (citation omitted). Each of these statements is a variation of the same theme: *If*
9 *possible, construe a statute so that the result is reasonable.*

10 The Court’s conclusion here, and the conclusion of *Palaciosreal*, leads to
11 unreasonable outcomes. The SCRA is meant to protect active duty servicemembers from
12 the burden of litigation while they are serving the United States full time. Yet the result in
13 *Palaciosreal* allows a plaintiff to burden a litigant in every conceivable way, including by
14 lining up all prerequisites for a default judgment and resisting efforts to set aside entry of
15 default, so long as they don’t obtain a default judgment. In essence, significantly burdening
16 a servicemember is permitted under the SCRA, just so long as a plaintiff doesn’t
17 specifically file a motion for default judgment. By this reasoning, Ms. Davis would have
18 been better off if she had ignored Voorhees’s state court case and allowed default judgment
19 to enter, as then she would have been able to set aside the judgment and seek relief under
20 the SCRA. A court should not encourage indolence in defending oneself.

21 Ms. Davis is not advancing an unheard-of legal theory, either. In *Murdock v.*
22 *Murdock*, the South Carolina Appellate Court interpreted the term “judgment” in its broad,
23 expansive meaning. 526 S.E.2d 241 (S.C. App. 1999). During a divorce, the trial court
24 continued a hearing on child support to allow more time for the husband to obtain counsel.
25 *Id.* at 244. The trial court entered a judgment against him for child support and debt
allocation, and the appellate court reversed, finding that the judgment was a default

1 judgment subject to scrutiny under the SCRA. *Id.* at 246. The servicemember was on active
2 duty and could not attend the hearings. *Id.* The South Carolina Appellate Court understood
3 that “judgment” has a broader meaning than what this Court has allowed. There was an
4 order to show cause for failure to pay child support, and the trial court was reversed. This
5 was not a traditional default judgment, either. While not a federal case, *Murdock* shows
6 that there are grounds for a difference of opinion on this issue, and that *Palaciosreal* need
7 not be treated as gospel. And while it may not be federal, it is at least *reported*.

8 Given the language and purpose of the SCRA, the problems with the *Palaciosreal*
9 decision, and the implications of allowing that decision to go unchallenged, namely giving
10 bad-faith plaintiffs free license to burden servicemembers with litigation so long as they
11 stop short of obtaining a default judgment, there are substantial grounds for disagreement
12 as to whether the SCRA forbids Voorhees’ conduct here. This is a question the Ninth
13 Circuit should resolve, just as it would have resolved had the plaintiff in *Palaciosreal*
14 appealed. The Court committed clear error causing manifest injustice by ignoring the
15 unresolved nature of this legal issue and not addressing Ms. Davis’s request for
16 certification.

17 **3.1.2 Certifying This Issue Would Advance the Ultimate Termination of
18 This Litigation**

19 An immediate interlocutory appeal would advance the ultimate termination of this
20 litigation. There are no longer any claims asserted against Voorhees, and her Counterclaim
21 does not involve any federal claims. There is thus no subject-matter jurisdiction over
22 Voorhees’s Counterclaim, and the Court should dismiss the Counterclaim under Fed. R.
23 Civ. P. 12(b)(1). If the Court does not do so *sua sponte*, Davis intends to seek dismissal of
24 the Counterclaim on this ground. Certifying this issue for immediate interlocutory appeal
25 avoids the potential procedural quagmire of having Voorhees’s Counterclaim dismissed

1 for lack of subject-matter jurisdiction (which would likely result in Voorhees re-asserting
2 her claims in state court), only for the Ninth Circuit to revive the SCRA claim, which would
3 re-establish subject-matter jurisdiction.

4 Voorhees argued in her reply that certification was not warranted because there is
5 no substantial ground for difference of opinion as to the applicability of the SCRA here,
6 and also that an immediate appeal would not help resolve the question of this Court's
7 subject-matter jurisdiction over Voorhees' Counterclaim. For the reasons stated above and
8 in Davis's Opposition, there are substantial grounds for difference of opinion as to whether
9 the SCRA allows abusive and opportunistic litigation tactics against a member of the armed
10 services to exploit their active duty status, so long as the plaintiff is stopped from seeking
11 default judgment by zealous representation.

12 As for Voorhees's second point, that diversity exists, there is no evidence of this.
13 Diversity jurisdiction is based upon the parties' citizenship at the time of filing the original
14 complaint, which here was November 11, 2021, after Davis had been a student at ERAU
15 for over 3 years. *Mann v. City of Tucson, Dep't of Police*, 782 F.2d 790, 794 (9th Cir. 1986).
16 As Voorhees admitted in her Counterclaim, "Davis, at all relevant times hereto, was a
17 resident of Yavapai County, Arizona." Doc. 50 at Counterclaim ¶ 2. Voorhees suggested in
18 her Reply that Davis may have been domiciled in North Carolina at the time because her
19 ROTC cadet contract, signed over 2 years before Davis filed suit, listed a home address in
20 North Carolina. Doc. 78 at 9; Doc. 75-3 at 9. A party's domicile can change over the course
21 of 2 years, especially when attending college, and Voorhees has not pled any facts
22 establishing diversity jurisdiction in her Counterclaim. With no record evidence or
23 allegations showing the existence of diversity jurisdiction, and the absence of a federal
24 claim with Voorhees as a party, this Court lacks subject-matter jurisdiction over Voorhees's
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1 Counterclaim. By not addressing the significant impact dismissing the SCRA claim would
2 have on this litigation or this element of the certification analysis, the Court again
3 committed a clear error causing manifest injustice.

4 **3.2 In the Alternative, the Court Should Clarify Whether it Made a
5 Determination as to Whether the Basis of its Order Was Suitable for
6 Certification to the Ninth Circuit**

7 Because the Court did not address Davis's request for certification, it is unknown
8 whether the Court ignored this request, denied it, or granted it without requisite findings.
9 Certification to the Ninth Circuit under 28 U.S.C. § 1292(b) requires that the Court state in
10 its order that there are grounds for substantial disagreement and that an interlocutory appeal
11 would advance the ultimate termination of litigation. If the Court found that these
12 requirements are met, then Davis requests that the Court amend its Order with such
13 findings. If the Court found that these requirements were not satisfied, then Davis requests
14 the Court explicitly state so on the record. The Court's silence as to Davis's request for
15 certification creates an ambiguity in its Order that should be clarified.

16 **4.0 CONCLUSION**

17 For the foregoing reasons, the Court should amend its Order granting Voorhees's
18 Motion to include findings that the requirements for certification of an immediate appeal
19 to the Ninth Circuit are satisfied.

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1 Dated: June 22, 2023.

Respectfully submitted,

2 /s/ Marc J. Randazza

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1 Case No. 3:21-cv-08249-DLR
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3 **CERTIFICATE OF SERVICE**
4

5 I HEREBY CERTIFY that on the 22nd day of June, 2023, I electronically filed the
6 foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true
7 and correct copy of the foregoing document is being served via transmission of Notices of
8 Electronic Filing generated by CM/ECF.
9

10 /s/ Marc J. Randazza
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